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FOR

TRIAL ADVOCACY: PROBLEMS AND CASE FILES

LAW SCHOOL EDITION 1990

Adapted for Canadian Usage

by

Garry D. Watson

Professor of Law

Osgoode Hall Law School

York University

These materials are an adaptation, designed for use in Canada, of materials originally prepared by Professors Brown and Seckinger for the National Institute for Trial Advocacy. The original materials on which these are based are copyrighted 1977 and 1979 by the National Institute for Trial Advocacy.

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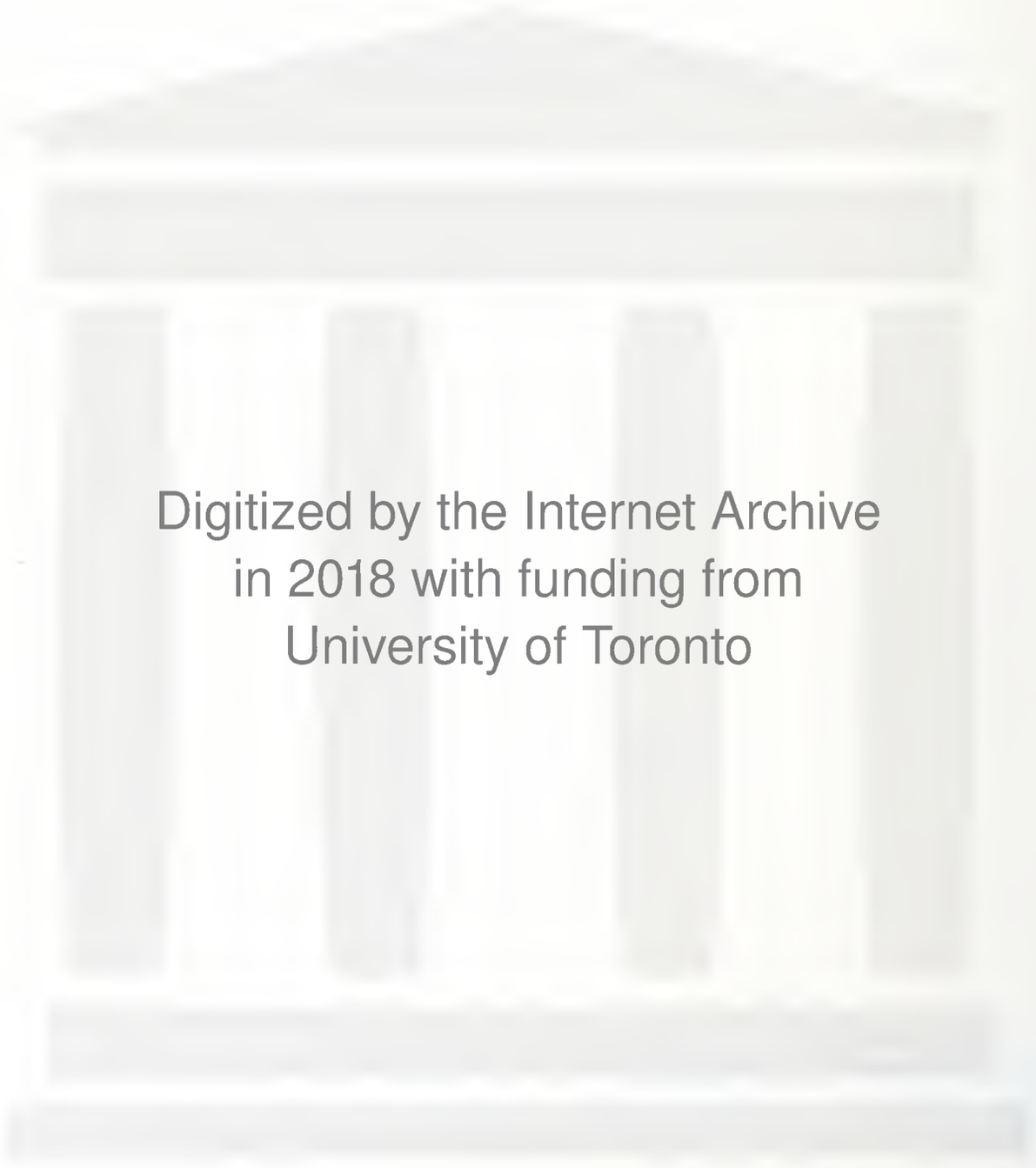

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I. INTRODUCTION

1. NATIONAL INSTITUTE FOR TRIAL ADVOCACY

In 1970, the Section of Judicial Administration of the American Bar association organized a Task Force on Trial Advocacy. This group of judges, trial lawyers and academics, sharing a common concern for improving the quality of advocacy in trial courts, convened in a series of meetings during 1970 and 1971. From these consultations emerged a new organization, the National Institute for Trial Advocacy (N.I.T.A.). From its inception, N.I.T.A. has had three corollary objectives: first, to train lawyers, and especially young lawyers, in advocacy; second, to develop methods and techniques for learning the skills of effective trial advocacy; and, third, to encourage the teaching and learning of these skills - to train teachers for service in law schools and in continuing legal education programs, to stimulate the creation of courses and programs in trial advocacy, and to aid in their development.

Distinctive teaching techniques were developed by N.I.T.A. at a series of teaching sessions held at Boulder, Colorado, during the period 1972-1975. These teaching techniques are the product of a unique co-operative effort by trial lawyers, judges and law teachers. Professor A. Leo Levin of the University of Pennsylvania was the first director of N.I.T.A. and it was under his leadership that N.I.T.A.'s method of team teaching was developed. Subsequent directors of N.I.T.A. have been Professor Robert Keeton of the Harvard Law School and Professor Kenneth S. Broun of the University of North Carolina.

In addition to its annual three-week program in Boulder, Colorado, in June and July, N.I.T.A. now holds shorter regional programs at various places in the United States at other times in the year. The materials and methods developed by N.I.T.A. are also widely employed in undergraduate programs at law schools in the United States and have recently been introduced at Canadian law schools.

2. TEACHING METHOD

The teaching methods developed by N.I.T.A. are based on two central devices: team teaching and "learning by doing with critique".

Team teaching involves using a number of persons working together at one time with a group of students. Ordinarily, a teaching team for a section (of approximately 24 students) consists of, at any given time, two team leaders who are experienced in teaching trial advocacy and two or three experienced trial lawyers or judges. While the team leaders serve throughout the teaching session, most of the other members of the teaching team serve for shorter periods of time - one or several days. Team leaders are responsible for organizing the teaching team and for running the class sessions.

The "learning by doing" element emphasizes the performance of exercises. The aim is to have every student perform as a trial advocate in a simulated problem exercise at some time during each day of classes. Also, during the program, every participant serves as a counsel in a full trial. During the simulated exercises it is possible that participants while learning by doing might learn bad habits as well as useful ones! Consequently, it is a second and equally essential part of the program that

a critique of student performance is carried out by the various trial lawyers, judges and teachers serving on the teaching team.

The method employed also permits learning by observing: by the participants viewing videotapes of their own performances, by observing their classmates tackle the performance exercises and by watching polished performances by experienced trial lawyers.

3. USING THESE MATERIALS

These materials are designed for use either in an intensive format program or in a law school program of a few hours per week over a semester or a year. Ideally they are designed to be used along with the teaching methods described above (though they can be usefully employed when some elements, for example videotape and videotape review, are not available).

The materials are divided into two parts. The first consists of a large number of problems designed to be used in class as performance exercises. Many of the problems are self-contained, drawing upon a factual situation contained in the problem. Others are problems based upon the second part of the materials - six complete case files. The materials are designed in such a way that in any teaching program two of the case files (one civil and one criminal) may be left unused during the teaching part of the program and reserved for use as the subject of a full trial.

Not all of the problems in these materials will be covered in any advocacy program or law school course. Indeed, some of the problems are

designed as alternatives.

What Law applies? Each of the problems and case files is set in a mythical Canadian province. This allows the materials to be used in teaching programs throughout the country. It is assumed that in using the materials, the law of the province in which the teaching program is held, or Federal Law where applicable, will apply. (In some instances statutes of the mythical province of Keewatin are included in the problem or case file. These are based on actual provincial legislation, but where an instructor feels that local law would serve just as well, local law could be substituted for these statutes.)

Dates in the materials. To keep the problems contemporary and realistic, all the years in these materials are stated in the following form: YR-0 indicates the year in which you are trying the case; YR-1 indicates the preceding year; YR-2 indicates the second preceding year, etc. In using the materials, please use actual years, i.e. do not use the terms YR-0 or YR-1 but substitute the actual year 1982, 1981, etc.

Criminal and Civil Exercises. These materials are designed to train lawyers in trial advocacy. They proceed on the assumption that the major skills of trial advocacy are applicable to trial work generally without regard to the nature of the case. However, different kinds of cases obviously present different kinds of problems. It is hoped that the problems included in the case files in the materials illustrate some of the more significant peculiarities of both civil and criminal litigation. The materials are designed in such a way that both a civil and a criminal case can be used as full trials. This will allow participants in the

program to exercise a degree of specialization by choosing whether they wish to participate in a civil or a criminal trial.

Mode of Trial. Unless otherwise directed you are to assume that all of the exercises are being performed at a trial before a judge and jury. Given that most civil trials in Canada are before a judge alone, rather than before a judge and jury, the question is often raised as to why we presuppose trial by jury in these materials. the essential reason is as follows. Law students and young lawyers generally assume that judges seem to prefer fact presentations that are complicated and boring. This is of course not true. On the other hand, young lawyers and law students appreciate the fact that if a case is being tried to a jury the factual presentation should be simple and interesting. Past experience indicates that the assumption that the trial is before a jury leads to performances which are quite suitable for a judge sitting alone.